In the
Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-329, 78-330

FRANCIS X. BELLOTTI, Attorney General of the Commonwealth of Massachusetts;
GARRETT BYRNE, District Attorney of the County of Suffolk; the District Attorneys of all other Counties, their agents, successors, those acting in concert with them, and all others similarly situated, Appellants in No. 78-329
JANE HUNERWADEL, for herself and all others similarly situated, Appellant in No. 78-330

v.

WILLIAM BAIRD; MARY MOE; PARENTS' AID SOCIETY, INC.; GERALD ZUPNICK, M.D.; and all others similarly situated, Appellees in Nos. 78-329 and 78-330

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MOTION TO AFFIRM AND BRIEF

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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MOTION TO AFFIRM

Appellees respectfully move this Court, pursuant to Rule 16(1)(d) of the Rules of the Supreme Court of the United

States, to affirm the judgment of the three-judge District Court upon the ground that the parental consent requirement of the Massachusetts abortion law, Massachusetts Gen. Laws ch. 112 §12S, is unconstitutional and inconsistent with *Roe* v. *Wade*, 400 U.S. 113 (1973), *Doe* v. *Bolton*, 410 U.S. 1979 and *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976).

Respectfully submitted:

JOSEPH J. BALLIRO
JOAN C. SCHMIDT
Attorneys for Appellees

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF IN SUPPORT OF MOTION TO AFFIRM

Appellees respectfully submit this brief in support of the motion to affirm.

Citation to Opinion Below

The opinion of the three-judge District Court has been officially reported as *Baird* v. *Bellotti*, 450 F. Supp. 997997 (D. Mass. 1978) and is set forth in Appendix A of appellants' jurisdictional statement.

Jurisdiction

Jurisdiction to consider the appeals is admitted.

Questions Presented

I

Whether Massachusetts Gen. Laws ch. 112 §12S, which prohibits physicians from performing abortions on unmarried minor women without either parental consent or judicial consent with notice to the parents, is unconstitutional on its face.

II

Whether the District Court should have permitted the Bellotti defendants to conduct a survey of health care facilities.

III

Whether the District Court should have rewritten Massachusetts Gen. Laws ch. 112 §12S in such a way as to limit its application.

IV

Whether the District Court erred in ordering the defendants to pay plaintiffs their costs.

Statement of the Case

The respective jurisdictional statements set out the facts with substantial accuracy.

Argument

Prior decisions of this Court have accorded to minors certain Constitutional rights. Among these rights is the right to privacy. *Planned Parenthood* v. *Danforth*, 428 U.S. 52 (1976). The right of privacy as construed by this Court encompasses the right of a woman to terminate her pregnancy in consultation with her physician. *Roe* v. *Wade*, 410 U.S. 113 (1973). State interference with the constitutional rights of minors must promote a "significant state interest," *Carey* v. *Population Services International*, 431 U.S. 678, 693 (1977); must not be unduly burdensome, *Baird* v. *Bellotti*, 428 U.S. 132 (1976); must be implemented by legislative enactments . . . narrowly drawn to express only legitimate state interests . . .", *Roe* v. *Wade*, *supra*, at 156; and must be the least obtrusive alternative.

The Court below correctly applied the above decisions. The District Court properly found that the Massachusetts statute as interpreted in *Baird* v. *Attorney*, — Mass. —, 1977 Mass. Adv. Sh. 96:

1. Unconstitutionally burdened those minors in whose best interest it is that their parents not be notified of their decision to terminate their pregnancies. *Baird* v. *Bellotti*, 450 F. Supp. 997, 1000 (1978) (*Baird* III)

2. Violated the due process and equal protection rights of mature minors who are capable of giving informed consent to abortion procedures by permitting a judicial override or veto of their consent. *Id.* at 1003.

3. Created an "impermissible chill" by use of overly broad language which could not be remedied by a limiting judicial construction. *Id.* at 1004.

Further support for the rationale of *Baird* III was recently given by the United States Court of Appeals for the Seventh Circuit in *Wynn* v. *Carey,* No. 78-1262 (7th Cir. August 17, 1978). That Court found unconstitutional an Illinois parental consent statute patterned after the Massachusetts statute in question in this appeal. The *Wynn* Court relied heavily on the reasoning in *Baird* III and drew similar conclusions.

The District Court's opinion was founded on evidence presented by the parties at two separate and complete trials. The Attorney General has argued in his jurisdictional statement that the District Court did not base its decision on an adequate factual record for reason that the District Court, after hearing, denied the defendants' motion for leave to conduct a health care survey among members of plaintiffs' physician class. The District Court acted well within its discretion in denying defendants' motion. The motion was untimely in that discovery for the *Baird* III trial was commenced by the defendants in February, 1977 and defendants failed to file their motion until August, 1977. The survey contemplated by the defendants was complex and its completion would have obviously required a continuation of the trial date. The survey itself was also of doubtful import to the issues to be tried. The issue before the District Court, was not whether some private health care providers discriminated or burdened minors, rather it was whether or not the Commonwealth by means of the statute had done so.

The defendants also question the scope of the remedy employed by the District Court. The District Court discussed at great length the ability of courts to rewrite statutes and decided that such a remedy would be inappropriate given the interpretation of the statute in *Baird* v. *Attorney General, supra,* and the failure of the legislature

to alter the unconstitutional aspects of the statute during a recent reenactment. The Court noted that:

> Whatever may have been the legislature's original intent, we observe that it reenacted the statute, without amendment, in 1977 Mass. Acts. ch. 397, not only after the Supreme Court had indicated what might pass constitutional muster, but after the Massachusetts court had disclosed this apparent overbreadth, and we had commented, in *Baird* III, on its chilling effect. The statute is a prominent public issue, and we cannot think the legislature was unaware of its judicial course. Under these circumstances it may be thought that the legislature prefers the chilling effect rather than to have the statute expressed in 'terms that the ordinary person exercising ordinary common sense can sufficiently understand.' " *Baird* III

The District Court quite properly left to the legislature the task of reformulating the statute.

Conclusion

This Court should affirm the final judgment and order of the District Court without further review.

Respectfully submitted,

JOSEPH J. BALLIRO
JOAN C. SCHMIDT
Attorneys for Appellees